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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1487

CONFEDERATION LIFE INSURANCE CO.,
Petitioner,

vs.

HECTOR de LARA, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

BRIEF OF RESPONDENTS TO PETITION FOR CERTIORARI

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REPLY BRIEF OF THE RESPONDENTS TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

The Respondents accept the references to opinions below, jurisdiction and constitutional provisions involved as set out in the Petition.

QUESTIONS PRESENTED

Because of the nature of the case, the arguments made by the Petitioner can be answered most directly by restating the questions presented. As restated, there are only two questions which can be considered:

1) In an ambulatory suit on an insurance contract, is Florida entitled to make its own determination as to choice of foreign law to be applied and to choose Canadian law to be applied to a Canadian corporation on a Canadian contract?

2) In a suit on an insurance contract which is executed, except for the payment of money by the insuror, can Florida require a Canadian insuror to pay in dollars which it has contracted to pay in lawful money of the United States?

STATEMENT OF FACTS

References to the appendix to the Petition for Certiorari will be made by use of the symbol "App." with appropriate page number. References to the appendix to the Petitioner's brief in the Florida Supreme Court, which Petitioner states on page 3 of the Petition has been lodged in this Court, will be made by use of the symbol "Fla. App." with appropriate page number.

The Petitioner is a Canadian corporation in the business of underwriting life insurance and is authorized to do business in Florida (Fla. App. 1A).

Petitioner has also conducted an insurance business in Cuba for many years.

In 1938, Petitioner received an application for a life insurance policy to be issued on the life of German Lopez Sanchez, a Cuban National. The application for the policy of life insurance was accepted by the Petitioner at its home office at Toronto, Canada, on May 4, 1938.

(Fla. App. 24.) The decision to go on the risk was made in Toronto. (Appendix to this brief A1; further references to the appendix to this brief will be made by use of the symbol "BR. App." with appropriate page number.)

This contract made in Canada by this Canadian insuror insured the life of Mr. Sanchez in the sum of $10,000 for the benefit of his wife and children. The Respondents here are the heirs of Mr. Sanchez, who are entitled to claim under the policy.

From 1938 to 1958, the premiums on the policy in the amount of $741.50 per year were paid in United States dollars or currency having equivalent value (BR. App. A2). After payment of these premiums in a total amount of $14,830 from 1938 to 1958, the policy had a cash surrender value of $5,990 (Fla. App. 44) (the cash value represents interest at 4% on the premium payments over the 20 years).

In 1958, the Cuban currency became essentially worthless (BR. App. A2). If, however, Mr. Sanchez had made no payments at all from 1958 to his death on June 8, 1962, his cash value would have more than covered the premiums under the policy.

The policy itself provides in pertinent part:

> "*Places of Interest*—All amounts payable or receivable under this policy shall be paid at the chief office of the association in the City of Havana, Republic Cuba, but the insured may, with the consent of the association, make payment elsewhere.
>
> *Currency*—All amounts payable or receivable under the policy shall be paid in lawful currency of the United States of America."

Respondents, Mr. Sanchez' heirs, had fled from Cuba to avoid the communist takeover with the exception of one Rosalia Lopez Orue and she has assigned her rights to Respondents resident in the United States and affirmatively wants them to take her share. The record is unrebutted that if Petitioners return to Cuba, they will not be allowed to leave (BR. App. A3).

The Petitioners' real concern in this case is demonstrated by the final paragraph of the Supplemental Petition for Rehearing filed by the Petitioners here in the Florida Supreme Court which says:

"It is established in the record that, on the date of Petitioners [Respondents here—ed.] demand, viz. October 31, 1962, the peso had a value of $0.15 in Miami, Florida. The effect of the Judgment of the trial court, which disregards the depreciation value of the peso in the United States dollars in Miami on the date of demand, is an unlawful enlargment of Respondents' obligation under the policy."

In brief, having collected the premium in money for 20 years, and having contracted to pay the benefits of the policy in lawful money of the United States, the Petitioners here now, at the moment of payment, will be happy to make payment anywhere as long as they pay only 15% of the face value of the policy. That is what this lawsuit is all about.

REASONS FOR DENYING THE WRIT

1) Florida Was Entitled to Choose Canadian As Opposed to Cuban Law.

In *Imperial Life Assurance Co. of Canada* v. *Colmenares,* 1967 Canada Law Reports (Sup. Ct.) 447, the Supreme Court of Canada considered a situation four square with the one at Bar. In that case, Colmenares, a Cuban National, made application for a life insurance policy to Imperial, a Canadian insuror who headquarters in Toronto.

The decision to go on the risk was made in Toronto. The policy was prepared in Toronto. The Supreme Court of Canada decided that the contract was made in Toronto when Imperial accepted the offer contained in the application and made out the policy and mailed it in Toronto. The Court further held that the law of Ontario governed the contract. A Judgment in dollars to the Claimant was affirmed.

Clearly, in the case at Bar, if the Petitioner had been sued at its home office, the *Colmenares* case would control and a recovery in dollars would be allowed.

The Opinion of the Florida Supreme Court in its decisional aspect provides that:

> "The decision of the District Court is quashed and the cause is remanded with instructions to reinstate the Order of the trial court."

The Order of the trial court thus reinstated provides in pertinent part:

> "Assuming that the argument made by the Defendant that the *lex loci contractus* governs is valid, the result would be the same. The Court finds that the place of making of the contract was Toronto, Canada, and that the *lex loci contractus* is Canadian law which would govern this Defendant (which is a Canadian corporation having its principal place of business in Toronto). The Supreme Court of Canada in the case of *Imperial Life Assurance Co. of Canada* v. *Segundo Casteleiro Y Colmenares,* copy of which Opinion is filed in this cause, specifically held that the Canadian law governs a factual situation virtually on all fours with the situation in this case and thus the Cuban law urged by the Defendant does not govern the case at bar."

Assuming for the purpose of this argument that under Cuban law the contract at Bar would be held to be a Cuban contract, it is equally apparent that under Canadian law the contract at Bar would be held to be a Canadian contract. In this situation, assuming that Petitioners' contention is correct as to the *lex loci contractus* applying, the Florida Supreme Court is confronted with a choice between the law of Canada and the law of Cuba. Florida chose the law

of Canada. Petitioner is here complaining because of that choice.

This Court said in *Klaxon Co.* v. *Stentor Electric Manufacturing Co., Inc.*, 313 U.S. 487, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941):

> "Subject only to review by this Court on any Federal question, Delaware is free to determine whether a given matter is to be governed by the law of the forum or by some other law (citation omitted). This Court's views are not the decisive factor in determining the applicable conflict rule (citation omitted)."

It is submitted that Petitioner, a Canadian corporation, cannot complain because the Florida Court applied the law of its domicile to it. What Petitioner is really saying is that the Florida Court has no right to make a choice between Canadian and Cuban law because Cuban law gives Petitioner a better financial break.

Petitioner's argument is that local law cannot be applied to this contract because of a lack of contact with Florida. However, Florida did not apply its local law, it applied the law of Canada which has ample contact with the contract.

2) Florida Can Procedurally Require This Canadian Insuror to Pay in Lawful Money of the United States When It Has Contracted to Pay in Lawful Money of the United States.

In *Confederation Life Assoc.* v. *Vega*, 207 So.2d 33, affirmed 211 So.2d 169, Cert. denied 393 U.S. 980 (1968), Florida held:

> "Applying the maxim that equity looks at the substance rather than the form of the transaction and since the primary purpose of this transaction is the payment of the cash surrender value of the policy after

a period of twenty years, and the provision of payment being made in Havana is merely for the convenience of the parties, there is no equitable reason why the plaintiff should not recover."

In the instant case, the principle is precisely the same. The monetary laws of Cuba, as the Florida Courts noted in *Vega*, have no application *per se* to this matter since Cuba's withdrawal from the international monetary fund. There is no question of treaty obligation to be considered here. Confederation contracted to pay in lawful money of the United States. There is no procedural reason why Florida cannot compel payment of lawful money in the United States. This Court will, we presume, not interfere with Florida decisions as to its own procedure.

CONCLUSION

The Petitioner's cleverly constructed argument and its hullabaloo about violations of international law by the Florida Courts are simply not sustainable on the record. What Florida decided was simply that as between Canadian and Cuban law, Canadian law is the *lex loci contractus*. Under that law, recovery by the Respondents is required. Procedurally, there is no bar to the recovery. Under Florida equitable principles, a meaningful recovery was to be allowed.

Florida did not apply its own local law to rape this defenseless insuror. It applied the law of Canada, the insuror's home State. It was clearly entitled to do so. It was clearly entitled to determine its own procedure. What the

law is in New York, or for that matter anywhere else is not material to this case.

The Petition for Certiorari should be denied.

Respectfully submitted,

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JUAN ACOSTA
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By: .....
SHALLE STEPHEN FINE

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was mailed first class, postage prepaid, air mail to John G. Laylin, William H. Allen and Michael Boudin, Esqs., attorneys for Petitioner, 888 Sixteenth Street, N. W., Washington, D.C. 20006, and regular mail to Thomas H. Anderson and Phillip Newcomm, Esqs., 1000 First National Bank Building, Miami Florida, 33131, this 13th day of June, 1972.

.....
SHALLE STEPHEN FINE

EXTRACT FROM TESTIMONY OF S. M. FARWELL, COUNSEL TO CONFEDERATION LIFE ASSOCIATION, TAKEN IN THE TRIAL OF THE CAUSE

Q. Then the names and the various things were typed into the policy?

A. Yes. It is a printed form with blanks, and they are completed by typing.

Q. Where was that done?

A. That was done in our head office in Toronto.

Q. Was the application forwarded up to Toronto?

A. From our Cuban branch.

Q. From the Cuban branch?

A. Yes.

Q. The policy reflects on the first page that it was signed, countersigned, Toronto; is that correct?

A. Yes. It doesn't say signed. It says - - -

Q. Legalized. Excuse me.

A. Yes.

Q. In fact, let's read it: "In Witness Whereof, these presents have been authorized with the official seal of the Association and duly legalized and countersigned at Toronto, Canada, this fourth day of May, 1938."

A. That is correct.

Q. That was done after the application had been reviewed in Toronto?

A. Yes.

Q. And a decision had been made to issue the policy?

A. Yes.

Q. In Toronto.

A. Well, not to issue the policy in Toronto. The decision was made in Toronto.

Q. To do what?

A. To accept the offer, this man's offer to enter into a contract contained in his application.

Q. The risk was made in Toronto?

EXTRACT OF THE TESTIMONY OF CLARENCE K. GRANT, MANAGER OF PERERA CO., DEALERS IN FOREIGN EXCHANGE, TAKEN IN THE CAUSE

BY MR. FINE:

Q. Mr. Grant, the decline in the value of the Cuban peso, as I understand it, began around 1959.

A. I would say gradually, yes. Ever since January 1, 1959, it was declining.

Q. Prior to that date what was the value, say, in December, 1958?

A. By December of 1958 there was already a rush, but if you take the - - - First of all, the legal value of the Cuban peso had been 98 cents because there was a two-percent exchange tax in Cuba, which made it automatically two cents cheaper; and, as a convenience, we were to buy it over the counter at 95 cents.

Q. That had been pretty well constant for a while, had it?

A. It was very, very constant.

Q. For many years?

A. Yes.

Q. Until Castro got there.

A. That's right.

Q. In other words, dollars and pesos, subject to the tax and your markup that you make as a currency broker, were just about even, subject to the tax and your currency markup, 95 cents and a dollar.

A. We used to buy it at 95 cents. Yes, sir.

EXTRACT OF THE TESTIMONY OF CARMEN de LARA ACOSTA

Q. How was Rosalia Lopez Orue related?

A. She was the only daughter that has survived.

Q. Other than Rosalia, all the rest have come to the United States?

A. Right.

Q. In the event you return to Cuba, will you be able to leave?

A. No. I don't think I could even go to Cuba.